No. 1216

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

SID W. RICHARDSON FOUNDATION, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Reply to the Brief for the United States in Opposition

INTRODUCTION

Numerous, important and, we believe, inexcusable inaccuracies in the statements contained in the brief for the United States in opposition to the Petition for Certiorari to which it is directed impel Petitioner to reply thereto and to point out such inaccuracies.

The terminology used in the Petition for Certiorari will be followed here. "Richardson" will refer to the decedent, Sid W. Richardson; "Estate" to the Estate of Sid W. Richardson, Deceased; and "Foundation" to Sid W. Richardson Foundation, the Petitioner. Further, "A" will refer to the Appendix attached to the Petition for Certiorari, and "R" to the appendix filed with the United States Court of Appeals for the

Fifth Circuit, and which, according to the brief of the United States in opposition, was filed with the Clerk of this Court. "Charity" or "charitable" will include all of the purposes or objects specified in Section 170(c)(2)(B), I.R.C. of 1954. "Petition" will refer to the Petition for Certiorari.

1. The Court will realize that the part of such brief which deals with the merits of the so-called "Subchapter S" question is irrelevant. That question is not raised by the Petition; the questions presented are clearly set forth on Pages 2 and 3 thereof.

2. The brief in opposition admits (Page 5) that it was repeatedly asserted that the Estate was entitled to an unlimited charitable deduction under Section 642(c), but states that these broad statements "were not related to any specific income." The governing instrument, the will, set apart all income, and all assets (not income), not used to satisfy specific bequests, for Foundation. Too, this is an irrelevant cloud newly conjured to avoid having the one issue which the Foundation has consistently raised considered on the merits. The obvious reason for not specifying any particular item of gross income is that it is by statute irrelevant on the facts under review, to-wit, the amount of gross income was stipulated, and the statute allows the deduction for "any amount of the gross income." Thus, in spite of Foundation's best efforts to have the "gross income" question considered, the brief in opposition is almost accurate in stating (Page 5): "* * * and the district court accordingly dealt only with that issue (the Subchapter S issue)."

The word "accordingly" erroneously implies that the district court's reason for its action was that the gross income question was not raised by Foundation. That court's opinion (R. 151) gave no such reason, and the record is amply inconsistent with such a statement. See Point 4 at Pages 4 and 5 below. That "Petitioner did not seek rehearing of the district court's decision," is as easily explained by the fact that the case had been under submission in the district court from October 15, 1965, to April 1, 1969 (over three and one-half years). Failure to restate a position already submitted to the district court is more properly attributed to Foundation's desire to have a more expeditious consideration of both of its claims than for any other reason.

3. The brief in opposition states (Page 5):

> "In its opening brief in the court of appeals, Petitioner discussed only the Subchapter S question with particularity, although it again claimed that the Estate was entitled to an unlimited charitable deduction."

That this is an incorrect statement is established by excerpts from such brief in the court of appeals, reproduced in the Appendix to Petition, Pages 106-7.

4. At Page 7 of the brief in opposition, it is stated:

> "The general claim that it was entitled to an unlimited charitable deduction did not emerge with any specificity until petitioner filed its reply brief in the court of appeals."

The following facts establish that this statement is wholly incorrect. The most casual examination of the record would show, as hereinafter detailed, that from the beginning to the present time, the primary contention of Foundation was that it was entitled to an unlimited charitable deduction, that it established all of the facts necessary to support such a claim, and that in each pleading and brief filed in either court below, the issue was presented on its merits.

(a) In the pretrial order (R. 78-79), it was stated:

> "The contested issue of ultimate fact and law is whether * * * the gross income of the Estate of S. W. Richardson, deceased, which * * * was to be used exclusively for religious, charitable, scientific, literary, or educational purposes, exceeded the amount of its taxable income computed without regard to the deduction under Section 642(c)."

(b) The amount of the Estate's gross income for each of the years was stipulated. (R. 67)

(c) Paragraph 5 of the complaint in the trial court (R. 6-7) alleged:

> "That said Estate had no taxable income and no income tax liability for either of said fiscal years for the reason that the unlimited charitable deduction, to which it was entitled under Section 642(c), Internal Revenue Code of 1954, substantially exceeded its net income before any deduction for such charitable contributions or amounts * * * to be used exclusively for religious, charitable, scientific, literary, or educational pur-

poses."

Defendant's answer (R. 13) denied these allegations.[1]

(d) The greater portion of the lengthy stipulation (R. 60-78), as well as the exhibits thereto, and substantially all of the oral testimony (R. 14, et seq.), had no pertinency to the Subchapter S question, but only bore upon the unlimited charitable deduction question; and, in its opinion at R. 152, the trial court expressly recognized the question was in the case, although that court's failure to consider the matter further is inexplicable, for at that time and until much later, no suggestion of the inadequacy of the refund claims to present the question had been raised.

(e) All of the above conclusively shows that the "unlimited charitable deduction" question was in the case from the beginning, that the trial court so understood, that the defendant met the issue from the beginning and until after submission to the Circuit Court and that there was no suggestion that the claims for refund were inadequate to present the issue until *after* the case was argued in the Circuit Court.

5. The statement in the brief in opposition (Page 8):

> "Prior to the filing of petitioner's reply brief in the court of appeals, the government did no more than deny, using the same general language used by petitioner, the Estate's entitlement to an unlimited charitable deduction,"

[1] By unexplainable *oversight*, the defendant's answer to this allegation was misstated. (A. 76-77) That portion of the defendant's answer correctly appears at R. 13.

is wholly incorrect. The facts are that in defendant's brief in the trial court (Page 7), it was stated:

> "Although each of these returns showed substantial amounts of gross and net income, exclusive of deductions claimed to be allowable under Section 642(c), Internal Revenue Code of 1954, neither of the returns showed any taxable income because deductions under Section 642(c) claimed in good faith by the executors exceeded the Estate's taxable income calculated without such deductions (Stip. par. IV)."

See also defendant's extended argument on the question at Pages 23-28 of its trial court brief. (A. pp. 102 to 105)

6. The brief in opposition states (Page 6):

> "But the court did consider the arguments raised in petitioner's reply brief and in its numerous post-argument submissions and rejected them, as evidenced by its *per curiam* opinion."

If there is any support for this statement, it is found in Footnote 8 to the Circuit Court's original opinion (A. 47), where, after holding that the unlimited charitable deduction question was improperly advanced, the court stated:

> "If we reached this question, we seriously doubt that the Foundation's argument could be accepted. It insists again on deductions for amounts never received by the Estate and never designated for charitable uses;"[2]

[2]The trial court found (R. 161): "No part of the revenues received by the Estate during these years was used for any purpose other than operation, maintenance, and protection of the properties of the Estate, and payment of debts and taxes, including death duties, and expenses of administration."

and the statement in the per curiam opinion (A. 50):

> "Even if the claim for refund is construed as embracing other contentions, such contentions are rejected by the court. We adhere to the conclusion reached * * * and that Foundation is not entitled to deduct from income, as charitable contributions under §642(c), IRC of 1954, amounts representing undistributed income of the Subchapter S corporation."

Since the Circuit Court held in its original opinion that the unlimited charitable deduction question was not properly before it, such casual observations cannot be considered as a holding on the merits of the unlimited charitable deduction question. Rather, the quoted statements support Foundation's claim that the court (1) recognized that the issue had been presented but (2) was arbitrarily refusing to grant Foundation the consideration of the issue on the merits to which it is entitled. It clearly does not evidence the type of consideration that the merits of this contention justify.

7. Further, the brief in opposition states (Pages 7-8)

> "Petitioner did not, as required by the regulations, 'set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof' with regard to what it now says (Pet. 13) is its 'primary position.'"

If the Commissioner was not so apprised, which he obviously was, it was because of his reading of the

claims improperly narrowed by the unique doctrine of "limitation by incorporation by reference." The claims were not inadequate. Each stated:

> "By virtue of Section 642(c), IRC of 1954, and the will of said decedent, said Estate was entitled to an unlimited charitable deduction in computing its income tax liability for the fiscal year ended September 30, 1960, in an amount not in excess of its gross income for said period, which gross income exceeded its net income, and owed no income tax for said period." (R. 105)

The claim for fiscal 1961 (R. 116) contained identical language, except for the substitution of September 30, 1961, for the earlier year. The whole course of the proceeding through the submission of the case to the Circuit Court shows beyond question that the respondent was fully advised of Foundation's position from the filing of the claims to the present time. There was no element of surprise. Instead, until after the case was submitted to the Circuit Court, the government, without at all questioning the adequacy of the refund claims, fairly and frankly opposed both of Foundation's positions on the merits.

8. The brief in opposition states (Page 8):

> "There is thus no conflict on the question of waiver between the decision below and this Court's holding in *Tucker v. Alexander*, 275 U.S. 228."

The *Tucker* case does not support this statement. In that case, the grounds stated in the claim were abandoned in the trial court, and the point litigated was

only that the Commissioner had erred in decreasing the March 1, 1913, value of property later distributed. This point was not raised in the petition in the district court nor in the claim for refund. In the course of the trial, the petitioner abandoned the points raised in its petition and attacked only the March 1, 1913, value. The court said:

> "That issue alone was litigated. At the close of the trial counsel stipulated that, if the court found the deduction to have been erroneously made, the petitioner should have judgment in the sum named. The District Court's judgment for petitioner was reversed by the Circuit Court of Appeals for the Eighth Circuit (15 F. 2d 356) which held that a recovery on grounds different from those set up in the claim for refund was precluded by Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924. * * * The case was brought here on certiorari to review this determination." (Pages 229-230)

The Supreme Court went on to say:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. *During the entire course of the trial no question was raised as to the sufficiency of the claim for refund.* The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913." (Page 230) (Emphasis supplied)

The court further said (Page 231):

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

This holding is all the more applicable and decisive of the claim for refund question in the present case because the government was not deceived or misled, as heretofore set out. Unless the asserted inadequacy first occurred to one of the attorneys who briefed the case for the appellee in the Circuit Court and who also is a signatory to the brief in opposition in this Court after the case was argued, and if instead it was always intended to raise the question when considered necessary, the action was truly setting a "trap for the unwary," and no argument or authority can justify or excuse it.

9. The concluding portion of the brief in opposition, that beginning under 2 on Page 9, finally reaches the merits of the Foundation's primary issue, on which issue Foundation is seeking a full review. The brief's one page treatment shows a complete misunderstanding, or if not that, a complete misstatement, of principles governing income taxation which might properly by classified as Hornbook Law. This is an added reason why this Petition should be granted. The essence of the position taken there is that the gross income of the Estate for the fiscal years involved was understated. Procedurally and factually, this is truly a strange contention at this point in the litigation when the Estate's gross income for both years was stipulated. It is also strange in that it is stated (Page 9):

> "If, on the other hand, the $15 million and $17 million figures represent income remaining after allowed business deductions, then petitioner's gross income as reported on its returns was understated by $13 million and $7.3 million, respectively. In this event, even assuming that petitioner would be entitled to additional deductions of $13 million and $7.3 million, this would do no more than offset the additional gross income that should have been included in its returns. Petitioner's tax liability would remain the same, since Oils' undistributed taxable income would still be includable in its gross income but would not be deductible."

Never before, we submit, has it been contended that "statutory gross income" represents income remaining after allowable business deductions. The gross

income which was stipulated and which is the outside measure of the allowable charitable deduction is the gross income as defined in Section 61 of the Code and as expressly added thereto by other portions thereof, to which detailed reference need not be made. Gross income is the starting point of an income tax computation. No deductions enter into the determination of its amount. See Section 61, IRC of 1954.

An issue so basic to the interpretation of the revenue laws deserves full review on the merits, either by this Court or on remand from this Court to a lower court. Securing that review is the essence of this Petition.

Finally, the brief in opposition attempts to avoid the applicability of the statutory mandate that "gross income" is the basic figure for determining the charitable deduction by asserting, on the authority of *United States v. Benedict*, 338 U.S. 692, that an impermissible double deduction is sought by Foundation: (i) the deductions taken in computing the Estate's net income before allowance of the charitable deduction, and (ii) a charitable deduction measured by gross income before such deduction. But the fallacy of this is easily demonstrated.

The situation presented in this case is unique in that income, gross or net, was not to be divided between taxable recipients and charity, as is the more usual situation. Here, practically speaking, the situation is the same as would have existed had the will made no provision for individual beneficiaries, for these were satisfied out of specific assets, leaving the

remainder "and all income received or accrued" during administration to Foundation. Every penny which Foundation was required to pay the Internal Revenue Service and herein seeks to recover reduces pro tanto the amount Foundation can use for its charitable purposes; and that is exactly what Congress, by using the phrase "any amount of the gross income, without limitation," intended to prevent.

The Respondent's reliance on *Benedict* is misplaced. There, income was to be divided between taxables and charity. An attempt was made to use a non-adroit provision as to taxation of long-term capital gains to benefit the taxables, not the charity. This benefit was denied in *Benedict*. Obviously, the holding in *Benedict* has no pertinency here.

Respondent completely overlooks the established rule that authorized use of gross income to pay debts, taxes, and claims (all prior claims on the corpus of the estate), and disbursements to protect estate properties, are uses for charitable purposes. *Commissioner v. Citizens & Southern Natl. Bank* (CA 5 1945), 147 F. 2d 977; *Bowers v. Slocum* (CA 2 1927), 20 F. 2d 350.

CONCLUSION

The Circuit Court gave no serious consideration to the merits of Foundation's claim for the full benefit of the charitable deduction granted estates by Section 642(c). Instead, by holding that the refund claims were inadequate to present the question, after it had been litigated on the merits in two courts without any suggestion of inadequacy and after Foundation's rights to amend the claims had expired by limitation, it approved setting a "trap for the unwary," contrary to decisions of this Court and its own decisions cited in the petition for certiorari, and committed irregularities in practice which should not be overlooked but which should be corrected by this Court, so that the charitable deductions to which Estate was clearly entitled can be allowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ..... day of ....., 1971, five copies of this Reply to the Brief for the United States in Opposition have been served on Respondent's attorney in envelope with sufficient postage prepaid and properly addressed as follows:

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